(8)

No. 05-184

FILED
SEP 7 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Appointing Authority for Military Commissions, Department of Defense; THOMAS L. HEMINGWAY, Brigadier General, Legal Advisor to the Appointing Authority for Military Commissions; JAY HOOD, Brigadier General, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER

JAMES J. BENJAMIN, JR.
Counsel of Record
NANCY CHUNG
AMIT KURLEKAR
LAURA S. LUCAS
STEVEN M. PESNER
SHANNON SHAH
AKIN GUMP STRAUSS HAUER & FELD LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1000

Attorneys for Amicus Curiae Association of the Bar of the City of New York

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE* AND SOURCE OF AUTHORITY TO FILE	1
STATEMENT OF THE CASE	2
A. The Government's Intention To Try Petitioner Before A Military Commission	2
B. Common Article 3 Of The Geneva Conventions Of 1949	4
C. The Proceedings Below	6
ARGUMENT	8
I. THERE IS AN URGENT NEED FOR THIS COURT TO PROVIDE GUIDANCE REGARDING MINIMAL PROCEDURAL REQUIREMENTS OF MILITARY COMMISSIONS UNDER COMMON ARTICLE 3	8
II. GIVEN THE IMPORTANCE OF THE QUESTION PRESENTED, THIS COURT SHOULD GRANT CERTIORARI IMMEDIATELY, RATHER THAN WAITING FOR THE CONCLUSION OF PROCEEDINGS BEFORE A MILITARY COMMISSION	16
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Abney v. United States, 431 U.S. 651 (1977) 17

Application of Yamashita, 327 U.S. 1 (1946) 9, 10, 11, 12

Breard v. Greene, 523 U.S. 371 (1998) 15

Duncan v. Kahanamoku, 327 U.S. 304 (1946) 9

Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 9, 16

Ex Parte Quirin, 317 U.S. 1 (1942) 9, 13, 16

Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004) 7, 8

Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).....*passim*

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).....*passim*

Johnson v. Eisentrager, 339 U.S. 763 (1950).....9, 11, 12, 14

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)..... 7, 15

Madsen v. Kinsella, 343 U.S. 341 (1952) 10, 12, 13

Medellin v. Dretke, 125 S. Ct. 2088 (2005)..... 20

Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002)..... 7, 15

Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) 15

Prosecutor v. Delalic, Judgement (ICTFY Appeals Chamber Feb. 20, 2001) 15

Rasul v. Bush, 124 S. Ct. 2686 (2004)..... 9, 12, 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

66 Fed. Reg. 57,833 (Nov. 13, 2001) 2

32 C.F.R. § 9 2

18 U.S.C. § 2441 ..... 5, 13, 17

Army Regulation 190-8, *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf, at § 1-5(a)(3) 6

Military Commission Order No. 1 (Dep't of Def. Aug. 31, 2005) 2, 3, 4, 19

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316 ..... *passim*

OTHER AUTHORITIES

Appeals Court Backs Bush's Tribunal Plan, Cincinnati Post, July 16, 2005, at A2 18

Appeals Court OKs Use of Military Tribunals at Gitmo, Newsday (USA) July 16, 2005, at A12 18

Associated Press, *Suit Seeks Release of 500 from Guantanamo* (Feb. 11, 2005), *available at* http://msnbc.msn.com/id/6954393 19

Associated Press, *Washington in Depth*, *available at* http://wid.ap.org/documents/detainees/list.html 19

Carol Rosenberg, *Court Rules bin Laden's Driver may be Tried at Guantanamo*, Duluth News Tribune, July 16, 2005 18

TABLE OF AUTHORITIES – Continued

Page

Court OKs Military Tribunals for Guantanamo Bay, Chicago Tribune, July 16, 2005 18

Demetri Sevastopulo, *Court Rules Guantánamo Trial is Lawful*, Financial Times (Wash., D.C.), July 15, 2005 19

Eleanor Holmes Norton, *Questions for Gonzales . . .*, Washington Post, Jan. 15, 2005, at A23 18

Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama*, Army Lawyer, Nov. 2003 13

International Committee of the Red Cross, *Commentaries to the Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (1949) 5

James L. Vallandigham, *A Life of Clement L. Vallandigham* (Turnbull Bros. 1872) 13

Judge Asks Status of Gitmo Detainees, Washington Post, Aug. 25, 2005, at A1 18

Louis Fisher, *Nazi Saboteurs on Trial* (Univ. Press of Kan. 2003) 13

Neil A. Lewis, *Ruling Lets U.S. Restart Trials At Guantanamo*, New York Times, July 16, 2005, at A1 18

New York Times Editorial Board, *Justice Detained*, New York Times, June 10, 2002, at A24 18

Press Release, President Meets with Afghan Interim Authority Chairman (Jan. 28, 2002), http://www.whitehouse.gov/news/releases/2002/01/20020128-13.html 4

TABLE OF AUTHORITIES – Continued

Page

Richard A. Serrano, *Appeals Court Backs Bush's Tribunal Plan at Gitmo*, Los Angeles Times, July 16, 2005 18

Richard Benedetto, *Bush Picks Gonzales to Replace Ashcroft*, USA Today, Nov. 10, 2004 18

Robert Burns, *Court: Al-Qaida not Protected by Conventions; Ruling Clears Way for Pentagon to Resume Military Trials of Terrorism Detainees*, Charleston Gazette, July 16, 2005, at 5B 18

Robert Burns, *Court: Detainee can Face Tribunal; Lawyers for bin Laden's Driver Plan to Appeal Decision*, Myrtle Beach Sun News (SC), July 16, 2005 18

Robert Burns, *Ruling Clears Way for Tribunals; Terror Suspects to Get Military Trials*, Columbian (Vancouver, WA) July 16, 2005, at A6 18

Robert Burns, *Trying Terrorist Suspects by Military Tribunal OK'd*, Seattle Times, July 16, 2005, at A4 18

Transcript, Defense Department Briefing (Jan. 22, 2002), http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm 4

INTEREST OF *AMICUS CURIAE* AND SOURCE OF AUTHORITY TO FILE[1]

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees. While it embraces the necessity of apprehending and punishing those responsible for terrorist acts and preventing future acts of terrorism, ABCNY believes that the Executive's actions in this and similar cases are dangerously eroding civil liberties and human rights. In particular, ABCNY believes that the Administration's cramped interpretation of the four Geneva Conventions of 1949 ("the Geneva Conventions" or "the Conventions"), and especially Common Article 3 of the Conventions, is incompatible with the United States' treaty obligations.

Military commissions convened at Guantanamo Bay ("Military Commissions") have the power to impose severe sentences, including death, on petitioner and a potentially large class of similarly-situated detainees. The government's extreme position – that Common Article 3 is simply inapplicable to Military Commissions and that the procedures to be followed may be defined by the President in his unfettered discretion – is at odds with lower court decisions, well-settled international jurisprudence, and the authoritative drafting history of the Geneva Conventions. This Court, however, has never indicated whether Common Article 3 guarantees minimal procedural rights to persons who are tried by U.S. military tribunals. ABCNY submits this brief to urge this Court to provide guidance

---

[1] All parties have consented to this filing. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

on the procedures that must be observed by Military Commissions under Common Article 3.[2]

STATEMENT OF THE CASE

A. The Government's Intention To Try Petitioner Before A Military Commission

On November 13, 2001, the President issued a Military Order providing for the establishment of Military Commissions. 66 Fed. Reg. 57,833 (Nov. 13, 2001). Pursuant to that Order, the Department of Defense issued Military Commission Order No. 1, which empowered the Secretary of Defense to try enemy combatants by Military Commission and defined the procedures of those Commissions.[3] Under that order, an enemy combatant convicted by a Military Commission can be sentenced to severe punishment, including imprisonment for any term up to life, or even death. *See* Mil. Comm'n Order No. 1 § 6(g) (Dep't of Def. Aug. 31, 2005).

Four aspects of the Military Commission procedures warrant special concern, as they represent a drastic deviation from our basic procedural norms:

- *First*, although the Military Commission rules nominally recognize an accused's right to be present during his trial, *id.* at § 5(k), that right yields if the Military Commission closes the proceedings to the accused and his Civilian Defense

---

[2] ABCNY expresses no view with respect to the merits of petitioner's case, including his alleged membership in al Qaeda and his guilt or innocence on the charges that have been filed against him.

[3] Military Commission Order No. 1 was originally promulgated on March 21, 2002, and was codified at 32 C.F.R. § 9. On August 31, 2005, after petitioner submitted his petition for a writ of certiorari but before the government submitted its response, the Department of Defense made certain changes to Military Commission Order No. 1. These amendments did not substantively change any Military Commission procedures that are relevant to the petition for a writ of certiorari. In this brief, we cite to the revised version of Military Commission Order No. 1.

Counsel based on anything the Presiding Officer or Secretary of Defense deems to be a matter of national security. *Id.* at § 6(b)(3). Just as troubling as this abrogation of the accused's rights is the prosecution's ability to offer evidence, under the rubric of "Protected Information," against an accused without his ever knowing about it. *See id.* at § 6(d)(5)(b). Although any admitted evidence must be seen by Detailed Defense Counsel, *see id.*, Detailed Defense Counsel is not permitted to share the content of that evidence with an accused or his Civilian Defense Counsel. In other words, an alleged enemy combatant could be sentenced to a lengthy prison term, or even executed, without knowing on what grounds he had been found guilty.[4]

- *Second*, the Military Commission may consider any evidence it deems probative "including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports." *Id.* at § 6(d)(3). Thus, even if an accused is present, the Military Commission may receive anonymous unsworn statements whose sources a defendant cannot confront or impeach.
- *Third*, the rules of the Military Commissions do not provide any standards for promptly charging or trying the alleged enemy combatants; petitioner, for example, was detained for over a year before the decision to try him was made, and was not charged until a full year after that.

---

[4] The amended version of Military Commission Order No. 1 includes a proviso that Protected Information may not be admitted if "the admission of such evidence would result in the denial of a full and fair trial." Mil. Comm'n Order No. 1 § 6(g). However, in light of the lack of independent appellate review discussed *infra* in text, this vague proviso is plainly inadequate to protect the accused's fundamental right to know about and contest the evidence offered by the prosecution.

- *Fourth*, an accused's final fate rests in the hands of the President and the Secretary of Defense. Even if an accused is pronounced "Not Guilty," that disposition will not take effect until it is finalized by the President or Secretary of Defense. *Id.* at § 6(h)(2). There is no provision for judicial review of the proceedings before Military Commissions, or of the decisions of the President or Secretary of Defense. In light of the lack of judicial review, the need for these officials' approval casts serious doubt on the impartiality of the Military Commissions, especially given the President's statement that those detained as alleged enemy combatants are "killers," Press Release, President Meets with Afghan Interim Authority Chairman (Jan. 28, 2002), http://www.whitehouse.gov/news/releases/2002/01/20020128-13.html; and the Secretary of Defense's comments in the same vein. *See* Transcript, Defense Department Briefing (Jan. 22, 2002), http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm (quoting Secretary of Defense as calling detainees "committed terrorists" who "have been found to be engaging on behalf of the al Qaeda").

In July 2003, the government designated petitioner, a foreign national captured in Afghanistan, for trial by a Military Commission. In April 2004, petitioner filed a petition for a writ of habeas corpus, claiming, *inter alia*, that the procedures governing Military Commissions are incompatible with the requirements of Common Article 3 of the Geneva Conventions of 1949. Before summarizing the proceedings below, we provide background regarding Common Article 3.

B. Common Article 3 Of The Geneva Conventions Of 1949

In 1949, soon after the horrors of World War II, representatives of 61 nations met in Geneva, Switzerland to consider revisions to the existing 1929 Geneva Conventions. The delegates drafted four separate treaties guaranteeing

protections to: (1) wounded and sick soldiers in the field; (2) wounded, sick and shipwrecked sailors; (3) prisoners of war; and (4) civilians. The four 1949 Conventions are commonly referred to by number; *i.e.*, the "First Geneva Convention" and so forth. The United States ratified all four of the 1949 Conventions in 1955. As of December 2004, almost 200 states, including Afghanistan, had ratified the Conventions.

The overwhelming majority of the Conventions' provisions apply to so-called "international" conflicts between signatory nations. For purposes of our *amicus* brief, those provisions are not directly relevant. But the framers of the Conventions recognized that other conflicts – those "not of an international character" (*i.e.*, those not between sovereign nations) – would continue to occur. After deliberations, the framers concluded that it would be impracticable to extend the full protections of the Conventions to these miscellaneous wars, many of which involve non-state actors and irregular forces. International Committee of the Red Cross, *Commentaries to the Convention (IV) Relative to the Protection of Civilian Persons in Time of War* 30-33 (1949). Seeking, however, to provide minimal humanitarian protections as a baseline for *all conflicts* on the territory of signatory nations, the framers created Common Article 3 – so called because it is common to all four Conventions – which establishes a minimum level of protections for conflicts "not of an international character." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316. Among the protections of Common Article 3 is the requirement that a person captured by a hostile force may be punished only after trial before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*

In 1996, the terms of Common Article 3 were incorporated into federal criminal law by the War Crimes Act, 18 U.S.C. Section 2441, which makes it a felony to engage in conduct "which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949." 18 U.S.C. § 2441(c)(3). The Third

and Fourth Geneva Conventions (each of which includes Common Article 3) were more generally implemented for the Armed Services by Army Regulation 190-8 (and identical regulations for the other Services) adopted on October 1, 1997. That regulation provides in Section 1-5(a)(3) that punishment of detainees "known to have, or suspected of having, committed serious offenses will be administered [in accordance with] GPW [the Third Geneva Convention], GC [the Fourth Geneva Convention], the Uniform Code of Military Justice and the Manual for Courts Martial." Army Regulation 190-8, *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf, at § 1-5(a)(3).

C. The Proceedings Below

In April 2004, petitioner filed a petition for a writ of habeas corpus asserting, *inter alia*, that: (1) Common Article 3 sets minimum standards for the trial of individuals captured in *any* armed conflict on the territory of a signatory nation; and (2) the procedures to be used in Military Commissions violate Common Article 3. In particular, petitioner argued that the provisions allowing his Military Commission to exclude him from his own trial and to convict him based on secret evidence contravene "the judicial guarantees which are recognized as indispensable by civilized peoples" as required under Common Article 3. In its motion to dismiss, the government argued that: (1) the Conventions are not enforceable by private litigants such as petitioner; and (2) even if the Conventions could be enforced by petitioner, Common Article 3 would not apply to Guantanamo detainees because it applies only to "local" conflicts such as civil wars, whereas the conflict against al Qaeda is international in nature.

The District Court granted the petition in part, ruling in relevant part that Common Article 3 applies to the Commissions: "It is universally agreed, and is demonstrable in the Convention language itself, in the context in which it was adopted, and by the generally accepted law of nations, that Common Article 3 embodies 'international

human norms,' and that it sets forth the 'most fundamental requirements of the law of war.'" *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 163 (D.D.C. 2004) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002)). The District Court was sharply critical of the Military Commission procedures permitting exclusion of the defendant and the admission of secret evidence, describing them as "fatally contrary to or inconsistent with those of the Uniform Code of Military Justice," 344 F. Supp. 2d at 166, and noting that "[i]t is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court," *id.* at 168. But the District Court abstained from determining what procedures were mandated by Common Article 3 because it determined that the proceedings against petitioner were otherwise deficient. *Id.* at 165-66, 172.

The Court of Appeals reversed the District Court's judgment and dismissed petitioner's habeas petition. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). In rejecting petitioner's claims based on Common Article 3, the Court of Appeals held that the protections of the Geneva Conventions, including Common Article 3, cannot be enforced by private litigants in federal court. *Id.* at 38-40. In addition, two of the three judges on the panel agreed with the government that even if the Conventions were enforceable, Common Article 3 would not protect petitioner because the Afghan conflict is "international in scope" and Common Article 3 applies only to "armed conflict[s] not of an international character." *Id.* at 41 (internal quotations omitted). The majority also concluded that, even if Common Article 3 applied to the Military Commissions and was enforceable by petitioner, the court should defer ruling on petitioner's claim until the conclusion of his trial before a Military Commission. *Id.* at 42.

Writing separately, Judge Williams agreed with the majority "that the Geneva Convention is not enforceable in courts of the United States and that any claims under

Common Article 3 should be deferred until proceedings against [petitioner] are finished." *Id.* at 44. Judge Williams disagreed, however, with "the conclusion that Common Article 3 does not apply to the United States's conduct toward al Qaeda personnel captured in the conflict in Afghanistan." *Id.* On that point, Judge Williams reasoned that most of the provisions of the Conventions were drafted with an eye toward conflicts between signatory nations, but that "Common Article 3 fills the gap, providing some minimal protection" for individuals captured in conflicts between signatories and non-state actors. *Id.* Judge Williams thus agreed with the District Court that "the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda." *Id.*

Notably, neither the majority nor Judge Williams cited decisions of the Second Circuit, the Northern District of Georgia, the International Court of Justice, and the International Criminal Tribunal for the Former Yugoslavia, all of which held that Common Article 3 applies to all conflicts, whether internal or international. The D.C. Circuit's decision is in conflict with these cases, which were relied upon by the District Court, *see* 344 F. Supp. 2d at 163, and are discussed *infra* at 14-15.

ARGUMENT

I. THERE IS AN URGENT NEED FOR THIS COURT TO PROVIDE GUIDANCE REGARDING MINIMAL PROCEDURAL REQUIREMENTS OF MILITARY COMMISSIONS UNDER COMMON ARTICLE 3

Since the waning days of the Civil War, this Court has decided a series of landmark cases arising from wartime efforts by the Executive Branch to prosecute individuals before military commissions. In these decisions, handed down in times of grave national emergency such as the aftermath of President Lincoln's assassination and the

depths of World War II, the Court laid down bedrock principles, including the following:

- Military commissions, which are statutorily authorized by Congress and deeply rooted in our nation's history, can be legitimately convened to try enemy belligerents for violations of the law of war during hostilities. *See, e.g., Ex Parte Quirin*, 317 U.S. 1 (1942); *accord Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 & n.8 (1946); *but cf. Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (military commissions lack jurisdiction to try civilian U.S. citizens who reside in a location where civil courts are open).
- An individual being tried by a commission within U.S. territory has the right to challenge the jurisdiction of that commission in the civil court system. *Quirin*, 317 U.S. at 24-25; *accord Application of Yamashita*, 327 U.S. 1, 9 (1946).
- At least under certain circumstances, an alien enemy combatant tried by a commission located outside U.S. territory lacks the ability to challenge the jurisdiction of the commission within the U.S. court system. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *cf. Rasul v. Bush*, 124 S. Ct. 2686 (2004) (affirming federal court jurisdiction over habeas petitions brought by alleged alien enemy combatants detained at Guantanamo Bay).
- Given the profound implications of trial and punishment by military authorities without basic Constitutional guarantees, this Court has a special responsibility to scrutinize the jurisdiction of commissions. *See, e.g., Milligan*, 71 U.S. at 125; *Quirin*, 317 U.S. at 19; *Yamashita*, 327 U.S. at 4; *Duncan*, 327 U.S. at 307; *Eisentrager*, 339 U.S. at 767.

Last Term, in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Court reaffirmed the indispensable role of courts in reviewing the administration of justice by military authorities. Although *Hamdi* did not directly address

military commissions, the Court held that a citizen being held as an enemy combatant must be given a meaningful opportunity to contest the factual basis for his detention. The plurality eloquently noted the importance of monitoring the preservation of civil liberties in time of war:

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

124 S. Ct. at 2648 (plurality op. of O'Connor, J.).

However, although this Court has issued landmark decisions in cases arising during wartime, its precedents provide *no guidance* regarding the minimum procedures that must be followed by military commissions under the 1949 Geneva Conventions. The Court has touched upon military commission procedures in two cases, *Yamashita*, 327 U.S. 1, and *Madsen v. Kinsella*, 343 U.S. 341 (1952), but neither case answers the critical question here: whether the Military Commissions must comply with the minimum procedural requirements imposed by Common Article 3.

In *Yamashita*, which arose out of the trial of a top Japanese general by a military commission at the end of World War II, the Court rejected the defendant's challenge to the tribunal's procedural rules. Those rules permitted the tribunal to receive in evidence depositions, affidavits, hearsay, and opinion evidence in a manner that would not be permitted in a criminal trial in a U.S. court. *See* 327 U.S. at 6. Over a strong dissent by Justice Rutledge, the Court held that the Articles of War (the predecessor to the Uniform Code of Military Justice) were silent regarding procedures to be followed by military commissions, leaving "the control over the procedure where it had previously

been, with the military command." *Yamashita*, 327 U.S. at 20. In a discussion that runs directly contrary to the D.C. Circuit's holding below, the Court then considered the defendant's argument that the procedures used by the military commission were impermissible under the 1929 Geneva Conventions. Finding that the 1929 Conventions only regulated procedures before imposing punishment for offenses committed during a prisoner's period of captivity, the Court concluded that the receipt of hearsay and opinion evidence at Yamashita's trial did not violate "any act of Congress, treaty or military command defining the commission's authority." *Yamashita*, 327 U.S. at 23.

Yamashita's holding became obsolete with the passage of the 1949 Conventions, which extended procedural protections far beyond the now-defunct 1929 Conventions. Common Article 3, for example – which requires minimal procedural protections in military trials conducted during a broad class of miscellaneous, non-international conflicts – was completely unknown in the 1929 Conventions. Given the intervening ratification of an entirely new treaty, the *Yamashita* holding provides no guidance on the question presented here.

In one important respect, however – its consideration of a challenge to military commission procedures under the Geneva Conventions – *Yamashita* remains a vital precedent. Indeed, in light of *Yamashita*, we are hard-pressed to explain the D.C. Circuit's holding that petitioner lacks the ability to invoke the Geneva Conventions in his habeas challenge. In this regard, the D.C. Circuit relied on footnote 14 in *Johnson v. Eisentrager*, *see Hamdan*, 415 F.3d at 39, but the *Eisentrager* footnote is inapt. In footnote 14 of *Eisentrager*, the Court noted that the prisoners in that case were entitled to proper treatment as captives under the 1929 Geneva Conventions. 339 U.S. at 789 n.14. However, the Court stated that the prisoners lacked the ability to enforce their treaty rights in federal court because "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* This observation followed inexorably from the

holding in *Eisentrager* that the prisoners, enemy aliens who were tried by military commissions outside U.S. territory, lacked the ability to bring *any challenge* in U.S. courts to their trial or punishment. With no independent cause of action to justify their presence in federal court, the *Eisentrager* petitioners were not permitted to rely on the treaty as their sole basis for filing suit. Here, by contrast, petitioner plainly has an independent basis for filing his claim in federal court: his statutory right, recognized in *Rasul*, to seek a petition for a writ of habeas corpus. Thus, in contrast to *Eisentrager*, the question here is whether a court adjudicating a properly-filed habeas claim may consider the effect of the Geneva Conventions on the merits of the habeas claim. As *Yamashita* indicates, the answer plainly is "yes."

This Court's only other discussion of military commission procedures occurred in *Madsen*, 343 U.S. 341. There, the Court noted in passing that neither the "procedure" nor the "jurisdiction" of military commissions "has been prescribed by statute. It has been adapted in each instance to the need that called it forth." *Id.* at 347-48. In contrast to *Yamashita*, however, the *Madsen* defendant did not invoke the Geneva Conventions or mount *any* challenge to the procedures that were used in her trial, probably because those procedures, which are recited in the Court's opinion, resemble those used in criminal trials in civilian courts. *See* 343 U.S. at 358 & n.24 (noting that the *Madsen* tribunal "had a less military character than that of courts martial"). In addition, *Madsen*, like *Yamashita*, was decided before the United States ratified the 1949 Conventions, so the Court did not (and could not) address Common Article 3.

Against the backdrop of silence from this Court regarding commission procedures under the 1949 Geneva Conventions, determining whether minimum procedural standards exist under Common Article 3 is urgent, all the more so because the current Military Commission procedures would deny petitioner and the Guantanamo detainees procedural safeguards to a degree never before seen in more than 200 years of military tribunals in this country.

A well-documented military tribunal used during the Civil War, for example, allowed for the accused to challenge commission members, be present for the whole trial, and personally conduct cross-examination of opposing witnesses. James L. Vallandigham, *A Life of Clement L. Vallandigham* 262, 264-77 (Turnbull Bros. 1872). More recently, although little was documented of the *Quirin* tribunal, the Court's opinion makes it clear that the saboteurs were charged and tried within weeks of their capture, 317 U.S. at 21-23, and it appears that the tribunal could not exclude the defendants from the proceedings. Louis Fisher, *Nazi Saboteurs on Trial* 54 (Univ. Press of Kan. 2003). Notably, the government in hindsight deemed the *Quirin* tribunals to be procedurally flawed and restructured subsequent World War II tribunals more favorably for the accused. *Id.* at 140-43. This evolution of *increasing* procedural safeguards was reflected in the *Madsen* procedures, which the Court described as *more* protective of the accused than a court martial. 343 U.S. at 358. The *Madsen* tribunal guaranteed the defendant *unqualified* rights to be present at trial and cross-examine witnesses, to counsel of her choice, and to present material witnesses in her own defense. *Id.* at 358 n.24.

Reflecting our Nation's historical commitment to fair military commission procedures, the government *prosecuted* Japanese officers after World War II for committing war crimes because they had presided over unfair trials of American prisoners in violation of the laws of war. *United States v. Uchiyama*, Review of Staff Judge Advocate, at 29 (Yokohama July 1, 1948) (cited in Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama*, Army Lawyer, Nov. 2003, at 18). And in the War Crimes Act of 1996, Congress made it a federal felony for certain categories of persons, including U.S. servicemembers, "whether inside or outside the United States," to commit a "war crime." 18 U.S.C. § 2441(a). The statute defines a "war crime," *inter alia*, as "any conduct . . . which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949." *See* 18 U.S.C. § 2441(c)(3).

The current Military Commissions reflect a significant and extremely troubling departure from this history. Nowhere in the proceedings below has the government identified a military tribunal with rules: (1) denying the right to be present at trial, (2) abrogating the right to confront evidence against the accused, (3) allowing for an indefinite delay before commencement of proceedings, and (4) establishing as the ultimate decision-maker on guilt an individual who has already prejudged the accused's guilt. We cannot imagine that the founders of our Nation (or the framers of Common Article 3) would have tolerated such a potentially abusive set of procedural rules. Put in its historical perspective, the novel and aggressive approach the government has taken in drafting the Military Commission procedures illustrates in sharp relief the lack of established minimum guidelines for those procedures, and the need for this Court to determine such guidelines.

By granting certiorari in this case, the Court will be able to settle the current uncertainty in the law regarding applicability of the 1949 Conventions to military commissions. Six justices in *Hamdi* joined opinions suggesting that the Conventions would guide any analysis of the legality of the Military Commissions. 124 S. Ct. at 2641, 2651 (O'Connor, J.); *id.* at 2658-59 (Souter, J.); *see also id.* at 2679 (Thomas, J.) (reading the plurality opinion as stating that the Third Geneva Convention limits the President's power). However, because *Hamdi* did not raise a challenge to Military Commission procedures, the Court did not resolve the applicability of the 1949 Conventions. This uncertainty permitted the Court of Appeals to conclude that the 1949 Conventions do not apply to the Commissions at all. *Hamdan*, 415 F.3d at 39 (citing *Eisentrager*, 339 U.S. at 789 n.14).

The legal uncertainty regarding the applicability of Common Article 3 is reflected by a split among lower courts. In the decision below, the Court of Appeals, in a divided opinion, reversed the District Court and held that

Common Article 3 prescribes minimum standards only for civil wars, and not for all armed conflicts. *Hamdan*, 415 F.3d at 40-42 (majority opinion); *but cf. id.* at 44 (Williams, J., concurring). This ruling has brought the D.C. Circuit into conflict with an earlier decision of the Second Circuit, relied upon by the District Court in this case, stating that under Common Article 3, "*all parties to a conflict* . . . are obliged to adhere to these most fundamental requirements of the law of war." *Kadic*, 70 F.3d at 243; *accord Mehinovic*, 198 F. Supp. 2d at 1351 n.39 (Common Article 3 is applicable "to any armed conflict, whether it is of an internal or international character"). Providing additional impetus for resolving this issue is the fact that international tribunals have unanimously held, in line with the Second Circuit, that Common Article 3 applies to all conflicts. *See, e.g., Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) ("[b]ecause the minimum rules applicable to international and to non-international conflicts are identical . . . [t]he relevant principles are to be looked for in the provisions of Article 3"); *Prosecutor v. Delalic*, Judgement, ¶ 140-50 (ICTFY Appeals Chamber Feb. 20, 2001) (the strictures of Common Article 3 "are so fundamental that they are regarded as governing both internal and international conflicts").[5] In summary, the glaring uncertainty surrounding the applicability of Common Article 3 to Military Commissions and the nature of minimal procedural safeguards necessitates attention by this Court.

---

[5] Although we recognize that international jurisprudence is not traditionally considered in petitions for writs of certiorari, we respectfully submit that unanimity of international authority in favor of Common Article 3's applicability provides additional grounds for the Court to examine the Court of Appeals' contrary conclusion, especially in light of this Court's statement that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Breard v. Greene*, 523 U.S. 371, 375 (1998).

II. GIVEN THE IMPORTANCE OF THE QUESTION PRESENTED, THIS COURT SHOULD GRANT CERTIORARI IMMEDIATELY, RATHER THAN WAITING FOR THE CONCLUSION OF PROCEEDINGS BEFORE A MILITARY COMMISSION

In its military commission cases over the past 150 years, this Court has consistently acknowledged the profound implications of the President's use of military commissions to punish individuals in wartime. In *Milligan*, 71 U.S. at 125, for example, the Court explained the dangers that would confront a society without judicial supervision of the military: "[Our founders] knew – the history of the world told them – the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, whatever lodged at such a time, was especially hazardous to freemen." *Id.* at 125. In the years since *Milligan*, the Court has treated challenges to military commissions as issues of paramount concern, deserving immediate review.

For example, in *Quirin*, 317 U.S. 1, the famous case arising from the trial of Nazi saboteurs who snuck into the United States on Long Island and in Florida, the Court *granted certiorari while the prisoners were still on trial* before a military commission. *Id.* at 19-21, 23. *Quirin* provides an authoritative precedent for granting certiorari here. Below, the Court of Appeals recognized *Quirin* as "a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan*, 415 F.3d at 36. As the Court of Appeals noted, this precedent is especially strong where the challenge to the commission, like the one in *Quirin*, is jurisdictional. 317 U.S. at 24-25. We agree with the Court of Appeals' observation that, with respect to jurisdictional challenges, "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has

no jurisdiction." *Hamdan*, 415 F.3d at 36 (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)).

Here, the inquiry as to whether Military Commissions comport with the minimum guarantees of Common Article 3 is a jurisdictional one. Under Common Article 3, only "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" is competent – *i.e.*, has jurisdiction – to serve as a military tribunal. Petitioner's contention, supported by ABCNY, is that the Military Commission procedures fail to comply with Common Article 3 *on their face*, rendering the Military Commissions without jurisdiction to try him unless those facial defects are remedied. This is different from an as-applied challenge, in which a detainee would challenge defects that occurred during his trial but were not incorporated into the Military Commission's rules (*i.e.*, if the Commissions were to consider evidence acquired through torture).

The importance of evaluating issues such as the legality of Military Commissions was recognized by this Court in *Rasul*, 124 S. Ct. 2686, and *Hamdi*, 124 S. Ct. 2633. In *Rasul*, this Court recognized the need to resolve the "important question" of whether a court could consider the Guantanamo detainees' challenge to the legality of their detention. 124 S. Ct. at 2690. In *Hamdi*, decided the same day, the Court ruled that a citizen being held as an enemy combatant must be given a meaningful opportunity to contest the factual basis for his detention. 124 S. Ct. at 2635 (O'Connor, J.); *id.* at 2660 (Souter, J.).

Resolution of the applicability and meaning of Common Article 3 is also warranted by Congress' mandate of strict compliance with Common Article 3. *See* 18 U.S.C. § 2441. Given the grave risk here of violations of Common Article 3, it is imperative for this Court to resolve the uncertainty regarding Common Article 3's applicability and meaning in the context of Military Commissions.

The necessity of defining basic ground rules for Military Commissions under Common Article 3 is also demonstrated by the exceptional public interest in the

legal proceedings against the Guantanamo detainees. The proper way to try detainees has been the subject of front-page headlines in newspapers around the country. *See, e.g., Judge Asks Status of Gitmo Detainees*, Washington Post, Aug. 25, 2005, at A1. It has been the subject of debate on the opinion and editorial pages. *See, e.g.*, New York Times Editorial Board, *Justice Detained*, New York Times, June 10, 2002, at A24. It loomed large in the Congressional questioning of Alberto Gonzales during his confirmation hearings for the Attorney General position. *See, e.g.*, Eleanor Holmes Norton, *Questions for Gonzales . . .* Washington Post, Jan. 15, 2005, at A23; Richard Benedetto, *Bush Picks Gonzales to Replace Ashcroft*, USA Today, Nov. 10, 2004.

Perhaps most telling, however, has been the extraordinary public focus on not only the Commissions themselves, but the way those tribunals are being evaluated by our civil justice system. Exemplifying this focus, newspapers around the U.S., in both major cities and smaller towns, carried news of the Court of Appeals' decision in this case the day after it was issued. *See, e.g.*, Robert Burns, *Court: Al-Qaida not Protected by Conventions; Ruling Clears Way for Pentagon to Resume Military Trials of Terrorism Detainees*, Charleston Gazette, July 16, 2005, at 5B; *Court OKs Military Tribunals for Guantanamo Bay*, Chicago Tribune, July 16, 2005; *Appeals Court Backs Bush's Tribunal Plan*, Cincinnati Post, July 16, 2005, at A2; Robert Burns, *Ruling Clears Way for Tribunals; Terror Suspects to Get Military Trials*, Columbian (Vancouver, WA) July 16, 2005, at A6; Carol Rosenberg, *Court Rules bin Laden's Driver may be Tried at Guantanamo*, Duluth News Tribune, July 16, 2005; Robert Burns, *Court: Detainee can Face Tribunal; Lawyers for bin Laden's Driver Plan to Appeal Decision*, Myrtle Beach Sun News (SC), July 16, 2005; Richard A. Serrano, *Appeals Court Backs Bush's Tribunal Plan at Gitmo*, Los Angeles Times, July 16, 2005; *Appeals Court OKs Use of Military Tribunals at Gitmo*, Newsday (USA) July 16, 2005, at A12; Neil A. Lewis, *Ruling Lets U.S. Restart Trials At Guantanamo*, New York Times, July 16, 2005, at A1; Robert Burns,

Trying Terrorist Suspects by Military Tribunal OK'd, Seattle Times, July 16, 2005, at A4; Demetri Sevastopulo, *Court Rules Guantánamo Trial is Lawful*, Financial Times (Wash., D.C.), July 15, 2005.

Given the pressing nature of the legal issues presented by this case, the Court should decide these issues without delay. Petitioner is the first member of an open-ended and potentially large class of Guantanamo detainees who will be tried by Military Commissions. Already, over 500 detainees, representing almost 40 nationalities, have filed over 70 cases challenging their detentions in various courts, many of which raise claims similar to those brought by petitioner. Associated Press, *Suit Seeks Release of 500 from Guantanamo* (Feb. 11, 2005), *available at* http://msnbc.msn.com/id/6954393. Over 20 of these detainees will be prosecuted before the Military Commissions. Associated Press, *Washington in Depth*, *available at* http://wid.ap.org/documents/detainees/list.html. Delay in resolving petitioner's case could mean that those cases will be decided by lower courts operating in a legal vacuum regarding the minimum requirements for Military Commission procedures. That vacuum also allows the government to change the rules of the Military Commissions with no guiding principle. Although the Department of Defense's late-breaking amendments to Military Commission Order No. 1 on August 31, 2005 *did not* meaningfully affect the procedures relevant to petitioner's habeas claim, they *did* illustrate that the Military Commission procedures are currently subject to change at the whim of the President and Secretary of Defense. Such an *ad hoc* approach to trial procedure is incompatible with both our own expectations of judicial reliability and Common Article 3's demand for a "*regularly* constituted court" (emphasis added).

Underscoring the significance of these issues is the fact that the Military Commissions are hardly ephemeral phenomena that will dissolve into irrelevance over time; as the *Hamdi* plurality presciently noted, the "war on terror" has no foreseeable conclusion, and it is "not far-fetched" that this "unconventional war" might last for generations.

124 S. Ct. at 2641 (O'Connor, J.). In other words, the detainees currently in the government's custody are merely the first of what could prove to be a large number of purported enemy belligerents in military custody. In light of this fact, it would be "unsound to avoid questions of national importance when they are bound to recur." *Medellin v. Dretke*, 125 S. Ct. 2088, 2096 (2005) (O'Connor, J., joined by Stevens, Souter and Breyer, JJ., dissenting from dismissal of writ of certiorari).

In conclusion, this Court should grant certiorari in this case, and it should do so now. At a point when prisoners are about to go on trial for their lives in cases of intense public interest, when grave uncertainty prevails about the basic procedural rules that will govern those trials, when lower courts are divided, and when there is no precedent from this Court, this Court should grant the petition for a writ of certiorari to clarify minimum procedural requirements of Military Commissions under Common Article 3.

CONCLUSION

For the reasons stated, ABCNY respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

JAMES J. BENJAMIN, JR.
Counsel of Record
NANCY CHUNG
AMIT KURLEKAR
LAURA S. LUCAS
STEVEN M. PESNER
SHANNON SHAH
AKIN GUMP STRAUSS HAUER & FELD LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1000

Attorneys for Amicus Curiae
Association of the Bar of the
City of New York